

IOWA FINANCE AUTHORITY [265]

Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 17A.3(1)“b” and Iowa Code Supplement section 16.5(1)“r”, the Iowa Finance Authority proposes to amend Chapter 9, “Title Guaranty Division,” Iowa Administrative Code.

These amendments replace current title plant waiver subrules with new subrules. These proposed amendments update and clarify the existing administrative rules needed to administer Iowa Code §16.91(5), and to conform the rules to correspond to Iowa Code §16.91(5) as amended by 2008 Iowa Acts, Senate File 2320, which was signed by the Governor and became effective on July 1, 2008. The amendments also update the rules generally.

The Authority will receive written comments on the proposed administrative rules until 4:30 p.m. on September 16, 2008. Comments may be addressed to Loyd Ogle, Director, Title Guaranty Division of the Iowa Finance Authority, 2015 Grand Avenue, Des Moines, Iowa 50312.

Comments may also be faxed to Loyd Ogle at (515) 725-4901 or E-mailed to loyd.ogle@iowa.gov.

There will be a public hearing on September 16, 2008, at 1:00 p.m. at the Iowa Finance Authority Office, at which time persons may present their views either orally or in writing. The Iowa Finance Authority office is located at 2015 Grand Avenue, Des Moines, Iowa 50312. The public hearing will also be held concurrently through various satellite ICN sites across Iowa. These sites will be listed on the Title Guaranty Division website.

The Authority anticipates that it may make changes to the proposed amendments based on comments received from the public.

These amendments are intended to implement Iowa Code Supplement section 16.5(1)“r,” Iowa Code sections 17A.12 and 17A.16, and Iowa Code section 16.91(5) as amended by 2008 Iowa Acts, Senate File 2320.

The following amendments are proposed.

ITEM 1. Delete existing rule 265—9.7(16) and adopt the following **new** rule 265—9.7(16).

9.7(16) Waiver of up-to-date title plant requirement. The division board shall consider an application by an attorney or abstractor for waiver of the use of an up-to-date title plant requirement described in Iowa Code section 16.91(5)“a”2.

9.7(1) Mission. The division is authorized under Iowa Code Chapter 16 to issue title guaranties throughout the state. Title guaranty’s public purpose is to facilitate lenders’ participation in the secondary market and to promote land title stability through use of the abstract-attorney opinion system. The division recognizes the forty year title plant as the preferred method of providing title evidence for the purpose of issuing title guaranties. The division must weigh the benefits of the traditional title plant with other alternatives to ensure buyers and lenders high quality of title guaranties throughout the state, rapid service, and a competitive price. To assist the division in this mission, Iowa Code section 16.91(5)“b” expressly allows the division to waive the up-to-date title plant requirement.

9.7(2) Definitions. The following words and phrases, when used in this rule, shall have the meanings set forth below unless a meaning is inconsistent with the manifest intent or the context of a particular rule:

“Availability of title guaranties” means that title guaranties are uniformly accessible throughout the state to buyers and lenders at a competitive price, service, and quality and that there are two or more abstractors physically located in all 99 counties.

“Exempt attorney-abstractor” as it relates to the title plant requirement means a grandfathered attorney or a waived attorney.

“Grandfathered attorney” means a participating attorney who has been providing abstract services continuously from November 12, 1986, to the date of application to be a participating abstractor, either personally or through persons under their supervision and control, who is exempt from the requirement to own or lease a title plant. This exemption is a personal exemption of the individual participating attorney, is not transferable, and terminates at such time as the participating attorney ceases providing abstracting services or upon the death or incapacity of the participating attorney.

“Hardship” means deprivation, suffering, adversity, or long term adverse financial impact in complying with the title plant requirement that is more than minimal when considering all the circumstances. Financial hardship alone may constitute a hardship.

“Interested person” means a person requesting a plant waiver, all division board members, all participating abstractors in the county for which the waiver is requested, the Iowa State Bar

Association, the Iowa Land Title Association, and any person requesting such information that an application for waiver has been made to the division.

“Person” means an individual including a corporation, limited liability company, government or governmental subdivision or agency, business trust, trust, partnership or association, or any other legal entity.

“Public interest” means that which is beneficial to the public as a whole, including but not limited to increasing competition among abstractors, encouraging the use of title guaranties throughout the state, making title guaranties more competitive than out-of-state title insurance, increasing the division’s market share, improving the quality of land titles, protecting consumers, and encouraging maximum participation by participating abstractors and participating attorneys physically located in all ninety-nine counties.

“Title plant” means tract indices or their equivalent as maintained in each county by local custom and practice for real estate in each county in which abstracts are prepared for real property titles guaranteed by the division. The tract indices shall contain a reference to all instruments affecting the real estate which are recorded in the office of the county recorder and shall commence not less than forty years prior to the date the abstractor commences participation in the title guaranty program.

“Waiver” or “Variance” means an action by the division which suspends in whole or in part the requirement of the use of a current tract index described in Iowa Code section 16.91(5) as applied to an abstractor.

9.7(3) Filing of application. An applicant must submit a plant waiver application in writing to the attention of the director of the Title Guaranty Division of the Iowa Finance Authority, 2015 Grand Avenue, Des Moines, Iowa 50312.

9.7(4) Content of application. Title Guaranty Division may provide an application form on the Division’s website. A plant waiver application shall include, at a minimum, the following information where applicable and known to the applicant : a. The name, business address, e-mail address, and telephone number of the abstractor for whom a waiver is being requested; b. The type of waiver being requested, as described in subrule 9.7(8) below; c. A general description of the applicant’s business; d. Description of intention to develop a 40-year tract index; and e. The relevant facts that the applicant believes would justify a waiver under subrules 9.7(7) and (8) described below. This application shall include a signed statement from the applicant attesting to the accuracy of the facts provided in the application.

9.7(5) Notification and response.

a. The division director shall acknowledge an application upon receipt. All interested persons shall be contacted by e-mail and web-site posting, and notice shall be given by United States First Class Mail to any party requesting the same in writing. Notice shall be given within 14 days of the receipt of the application by the division director. Notification to an interested person is not a requirement for the division board to consider the waiver, and failure to inform an interested person of an application for waiver shall not void or otherwise nullify any action or decision of the division board.

b. Any person may submit a statement in support of or in opposition to the application in writing.

c. The application shall be placed on the agenda for the next scheduled division board meeting which is at least 30 days after the application is filed unless a special meeting is requested by the chair of the board or by written request of two board members.

9.7(6) Board meeting action.

- a. The informal review of the waiver is not a contested case proceeding but other agency action wherein the rules of evidence are not applicable.
- b. To preserve order, the chair of the board may set reasonable limitations upon the number of persons who may appear before the division board and the time allotted for presentations in favor of and against the requested waiver.
- c. Title guaranty director review. The title guaranty director shall investigate and review the petition and its supporting documentation and, at the waiver meeting before the board, shall give the board a recommendation to grant or deny the waiver.
- d. The board shall consider the application, the criteria and type of waiver set forth below in subrules 9.7(7) and 9.7(8), and then vote on the application.

9.7(7) Criteria for waiver or variance. In response to an application completed pursuant to subrule 9.7(4), the division board may issue a ruling permanently or provisionally waiving the requirement set forth in Iowa Code section 16.91(5)“a”2 of an up-to-date title plant requirement, if the board finds both of the following:

- a. The title plant requirement described in Iowa Code section 16.91(5)“a”2 imposes a hardship to the abstractor or attorney; and
- b. The waiver is:
 - (1) Clearly in the public interest; or
 - (2) Absolutely necessary to ensure availability of title guaranties throughout the state.

9.7(8) Type of waiver or variance granted. Provisional and permanent waivers described in this subsection may be granted by the division board. Guidelines for provisional and permanent waivers are as follows:

- a. Provisional waivers. The division board may grant a provisional waiver of one year or less to an applicant intending to build a title plant. If such time period is not sufficient, the applicant may reapply to the division board for an extension of the waiver up to one additional year at the discretion of the division board. The division board may grant a provisional waiver when the applicant provides the following:
 - (1) Evidence that a title plant will be built for a specified county;
 - (2) Evidence of significant financial loss due to the inability to provide abstracts for the division;
 - (3) Evidence the provisional waiver is necessary in order to produce a revenue stream to justify the expense associated with building a title plant; and
 - (4) Professional references from two licensed Iowa attorneys or one participating plant-abstractor attesting to the applicant’s ability to abstract
- b. Permanent waivers for attorneys. The division board may grant a permanent waiver to an Iowa licensed attorney.
 - (1) Attorneys granted a permanent waiver hold the same status as grandfathered attorneys and absent express legislative authority to the contrary, the board will not limit geographically an attorney’s ability to abstract for Title Guaranty. However, the applicant may by contract with the Division Board agree voluntarily to limit the applicant’s abstracting for the division to one or more specified counties.
 - (2) A permanent waiver is personal in nature and non-transferable. An attorney granted a permanent waiver shall be personally liable for abstracting conducted on behalf of the division. Although an attorney may abstract through a separate entity, such liability cannot be transferred to a corporate entity nor may an attorney utilize a corporate structure which would shield the attorney from personal liability.

(3) Permanent waivers are predicated upon the attorney retaining an Iowa license to practice law. An attorney whose license is suspended shall reapply to the division director upon reinstatement by the Iowa Supreme Court. The division director has the discretion to refer the matter to the division board.

(4) There are two circumstances when an attorney may be granted a permanent waiver:

(a) For attorney applicants with experience abstracting under the supervision and control of an exempt attorney-abstractor, the board shall consider, at a minimum, the following:

i. The applicant's abstract experience. The board shall give considerable weight to an applicant's experience abstracting under the personal supervision and control of an exempt attorney-abstractor with whom the applicant has had a close working relationship, or is a legal partner or associate.

ii. Professional references. The board shall give considerable weight to a recommendation from the exempt attorney-abstractor or grandfathered attorney who personally supervised the applicant's abstracting for a period of two years or more and is able to attest in writing or in person before the division board regarding the applicant's ability to abstract.

iii. Samples of abstracts prepared by the applicant.

iv. The Division Board shall give consideration to the number of participating abstractors physically located in the county or counties where the applicant seeks to abstract in determining whether a waiver should be granted.

(b). For attorney applicants without experience working under the supervision and control of an exempt attorney abstractor, the board shall consider, at a minimum, the following:

i. The applicant's abstract experience;

ii. Professional references;

iii. Samples of abstracts prepared by the applicant;

iv. The applicant's business plan;

v. Evidence of clients and volume of additional transactions that will be brought into the title guaranty abstract/attorney system as a result of the waiver;

vi. The number, availability, service and quality of other abstractors available to perform abstracting and whether the grant of a permanent waiver will adversely impact the business of other participating abstractors;

vii. Whether the applicant demonstrates the inability to abstract under the supervision and control of an exempt attorney.

c. Permanent waivers for non-attorneys.

(1) The board may grant a permanent waiver with limitations as to county, and/or transaction type.

(2) In determining whether to grant a waiver, the board shall consider, at a minimum, the following:

(a) The applicant's abstract experience, their maintenance of a title plant in any other county, and their degree of participation in the title guaranty division standards in excellence program;

- (b) Professional references;
- (c) Samples of abstracts prepared by the applicant;
- (d) The applicant's business plan;
- (e) Evidence of clients and volume of additional transactions that will be brought into the title guaranty abstract/attorney system as a result of the waiver;
- (f) The number, availability, service and quality of other abstractors available to perform abstracting and whether the grant of a permanent waiver will adversely impact the business of other participating abstractors.

9.7(9) Ruling. The division board shall direct the division director to prepare, or cause to be prepared, a proposed written ruling setting forth the board's rationale for granting or denying the waiver. Action to adopt or direct changes to the proposed ruling will be taken by the division board at a subsequent meeting. However, if the board directs the division director to prepare a proposed ruling granting the waiver, the applicant may start abstracting while the ruling is being prepared, and staff shall issue a new participating abstractor number to the applicant immediately.

a. The ruling granting or denying a waiver shall contain a reference to the particular applicant, discuss the application of subrules 9.7(7) and (8) above, and describe how granting the waiver would or would not advance the division's statutory mission described above in subrule 9.7(1). The ruling will summarize the relevant facts and reasons upon which the action is based and include a description of the precise scope and duration of the waiver if the waiver contains limitations, restrictions or requirements.

b. The final decision on whether the circumstances justify the granting of a waiver shall be made at the sole discretion of the division board upon consideration of all relevant factors. Relevant factors to be considered are the unique circumstances set out in the application, presentations given before the board, the professional knowledge and expertise of the board members and division staff, and any other resources available to the entire division board. Consideration should be afforded to rulings on prior plant waiver requests, but the division board shall not be bound by such rulings.

c. Within seven days of its issuance, any ruling issued under this subsection shall be transmitted to the applicant, the Iowa State Bar Association and the Iowa Land Title Association.

d. The decision of the division board shall be final agency action and all appeals shall be filed with the Iowa District Court for Polk County.

9.7(10) Title plant certification. For applicants granted a provisional waiver, the division shall inspect the title plant and certify to the division board that the title plant is complete before the board may grant up-to-date title plant status to the applicant. Upon certification of up-to-date title plant status, the applicant must obtain approval from the division to conduct business under a name other than the entity to which the provisional waiver was granted. Any transfer of a title plant must be approved by the division in order for the title plant to be a title guaranty abstractor.

9.7(11) Public availability. Applications for waivers and rulings on waiver applications are public records under Iowa Code chapter 22. Some applications or rulings may contain information the division is authorized or required to keep confidential. The division may accordingly redact confidential information from applications or rulings prior to public inspection or dissemination.

9.7(12) Voiding or cancellation. A waiver or variance is voidable if material facts upon which the petition is based are not true or if material facts have been withheld. A waiver or variance issued by the division board pursuant to this subsection may be withdrawn, canceled, or modified if, after appropriate notice and meeting, the division board issues a ruling finding any of the following:

- a. That the petitioner or the applicant who was the subject of the waiver ruling withheld or misrepresented material facts relevant to the propriety or desirability of the waiver; or
- b. That the alternative search method assuring that the public interest will be adequately protected after issuance of the ruling has been demonstrated to be insufficient; or
- c. That the subject of the waiver ruling has failed to comply with all conditions contained in the ruling.

Respectfully submitted,

Bret L. Mills, Executive Director
By Authority of the Board of the Iowa Finance Authority

_____, 2008
Date